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Supreme Court, U.S.
FILED

041108 JUL 26 2004

OFFICE OF THE CLERK

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

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PHILLIP H. FRAZIER-PETITIONER, IN PRO SE

vs.

CARL E. FRAZIER et al.,-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEAL, SIXTH APPELLATE DISTRICT

# PETITION FOR WRIT OF CERTIORARI

PHILLIP H. FRAZIER
222 J. Street, #426
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(619) 696-6922 ext. 426

## QUESTIONS(S) PRESENTED

The questions presented are:

1. Whether the court of appeals correct-affirmed judgment in favor of CARL E. FRAZIER dispute the fact that PHILLIP H. FRAZIER "right of trial by jury" regarding this case exceeded twenty dollars, was denied and violated PHILLIP H. FRAZIER'S United States Constitutional Rights under the Seventh and Fourteenth Amendments.

2. Whether the court of appeals correctly affirmed judgment in favor of Carl E. FRAZIER dispute long-time case law from this Court and courts below, with opinions without question favor the petitioner PHILLIP H. FRAZIER regarding the Doctrine of Adverse Possession under claim of right and ownership of real estate property to include a strip of land already vested to the Frazier's deed after April 04, 1961.

3. Whether the court of appeals corr-

ectly rejected PHILLIP H. FRAZIER'S alternative Doctrine of Agreed Boundaries pertain to the strip of land in dispute in this case.

4. Whether the court of appeals correctly rejected PHILLIP H. FRAZIER'S claim concerning the taxes which PHILLIP H. FRAZIER claims were paid by the Frazier's on the strip of land in this case since the Frazier Family has always been in possession of the strip of land in dispute in this case.

5. Whether the court of appeals correctly rejected PHILLIP H. FRAZIER'S Motion For Reconsideration as a nonappealable order.

6. Whether the court of appeals correctly rejected PHILLIP H. FRAZIER'S claim that any claim to the strip of land in dispute in this case expired pursuant to the Statute of Limitations and Laches after April 04, 1961, when the strip of land vested to the Frazier Family's deed. No action for the

recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action. Mr. Traino attempted to usurp the strip of land from the Frazier Family thirty-nine (39) years after the strip of land vested to the Frazier Family's deed.

7. When the strip of land vested to the Frazier Family's deed after all the elements of adverse possession, and or agreed boundaries have been meet, and the Frazier Family has always been in possession of the strip of land, and cultivated the strip of land, claimed the strip of land under color of right, and improved the strip of land, albeit, the most recent improvement to the strip of land done by the Frazier Family was a driveway expansion which was

approved by the City of San Jose, California, and a permit was issued for the driveway expansion after the City of San Jose made several on-site inspections, measurements, and surveys to insure that the driveway expansion was indeed on the property of the Frazier Family, and that the driveway expansion did not encroach upon the property of the neighbor Mr. Traino. The question is whether the court of appeals correctly rejected PHILLIP H. FRAZIER'S claim that although the driveway expansion and improvement to the strip of land in dispute occurred in the year 2000, and the Frazier Family was and had been in possession of the strip of land since April 04, 1956, and the strip of land vested to the Frazier deed on or after April 04, 1961, and the strip of land remains the property of the Frazier Family, and Mr. Traino has no right or claim to the strip of land although the

Frazier Family improved the strip of land with a driveway expansion which did not encroach upon the Traino property. With the Frazier Family improving the strip of land with a driveway expansion, the Frazier Family did not give up any right or title to the strip of land. And contrary to the court of appeals, the strip of land does not belong to Mr. Traino, but is the sole ownership and possession of the Frazier's.

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Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702 (March 11, 1959) ...

Marriage v. Kenner, 26 cal. App. 4th 186 (June 1994) .....

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California Code of Civil Procedure Section 318 et seq.....

California Code of Civil Procedure Section 325 et seq.....

California Code of Civil Procedure Section 904.1.....

California Civil Code Section 1007 et seq....

California Revenue and Tax Code Section 103.....

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Ehrman & Flavin, Taxing California Property (3rd Ed.) § 8:3.....

## JURISDICTION

[x] For cases from state courts:

The date on which the highest state court, that being THE SUPREME COURT OF CALIFORNIA, DENIED my Petition for review. The Court meet En Banc.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

April 28, 2004 was the date that The Supreme Court of California denied my petition for review.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, AMENDMENT VII
2. The United States Constitution, AMENDMENT X1V
3. California's Code of Civil Procedure Section 318 et seq.
4. California's Code of Civil Procedure Section 325 et seq.
5. California's Code of Civil Procedure Section 904.1
6. California Civil Code Section 1007 et seq.
7. California's Revenue and Tax Code Section 103

## STATEMENT OF THE CASE

The Petitioner IN PRO SE, PHILLIP H. FRAZIER holds title with his mother THELMA LOUISE FRAZIER as a FIFTY PERCENT "TENANCY IN COMMON" in the property dispute between his brother CARL E. FRAZIER et al., RESPONDENTS. CARL E. FRAZIER was first choice to have the property in dispute to be granted to him, in that CARL E. FRAZIER was the only child and sibling living in San Jose, California. Our mother THELMA LOUISE FRAZIER was attempting to grant CARL E. FRAZIER FIFTY PERCENT "TENANCY IN COMMON" without any "consideration." CARL E. FRAZIER declined the offer of our mother, and the property was granted to PHILLIP H. FRAZIER without any "consideration" and while our mother THELMA LOUISE FRAZIER was of sound mind and body. the GRANT DEED reflecting the FIFTY PERCENT "TENANCY IN COMMON" to PHILLIP H. FRAZIER was

on November 07, 2001, at San Jose, California. The approximately two feet strip of land in front of the Frazier Family residence and property, vested to the Frazier Family deed after April 04, 1961 pursuant to the Doctrine of Adverse Possession. The Frazier Family meet all elements of the Doctrine of Adverse Possession, including that of paying all the taxes on the strip of land, in that the Frazier Family has been in possession of the strip of land since April 04, 1956, and Mr. Traino has never been in possession of the strip of land in dispute in this case. In addition, the Frazier Family claimed the strip of land under color of right, and cultivated the strip of land, claimed right and ownership of the strip of land, and have been in possession of the strip of land as its sole ownership, and title holders.

The Frazier Family also meet all elements of the Doctrine of Agreed Boundaries, and alternative doctrine to obtain title to real property when all the elements have been meet.

On or about late July 2002, and or early August 2002, or mother THELMA LOUISE FRAZIER suffered multiple strokes and was hospitalized for over a month. On or about July 11, 2003, CARL E. FRAZIER was transferred all property of the estate of our mother THELMA LOUISE FRAZIER as her Conservator of the Person and Estate of THELMA LOUISE FRAZIER. Previously, the Public Guardian of the County of Santa Clara was the Conservator, and previous to that, PHILLIP H. FRAZER was the Conservator.

On or about January 21, 2003, CARL E. FRAZIER executed a written settlement to give away the two feet strip

of land to the next door neighbor, Mr. Traino. Although the strip of land vested to the Frazier Family deed after April 04, 1961, and Mr. Traino never was in possession of the strip of land; never claimed any right or ownership to the strip of land until approximately thirty-three (33) years after becoming the next door neighbor to the Frazier Family. In addition, Mr. Traino never cultivated or improved the strip of land. In contrast, the Frazier Family was always in possession of the strip of land, always claimed ownership to the strip of land as a claim of right, and did all cultivations and improvements to the stripe of land in dispute in this case.

PHILLIP H. FRAZIER filed a Motion For Reconsideration which was denied; an appeal to the appellate court which affirmed the lower court; and a Petition For Review to the California Supreme Court was filed, which the California Supreme Court

denied the Petition. This Writ of Certiorari ensued.

## REASONS FOR GRANTING THE PETITION

The following compelling reasons relied on for allowance of the writ of certiorari are as follows:

1. The lower courts decisions conflicts with the Supreme Court Of The United States long existing case law. See Crittenden v. Dorn, 257 U.S. 648 (9th Cir, Cal. 1921). The lower court decision is at 274 F. 520. See Harris v. McGovern, 99 U.S. 161 (1879). Also see Teall v. Schroder, 158 U.S. 172 (1895). The foregoing case laws have long established that property which was obtained by adverse possession had been settled upon by this High Court, and that the lower courts need a strong reminder from this High Court that past opinions settling the nearly identical dispute has long been established in this High Court's previous opinions.

2. The California Supreme Court has already spoken on the subject matter relating to this case. See Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702 (march 11, 1959).

3. The California Court of Appeals appears to conflict with their own decisions. See California Maryland Funding, Inc. v. Lowe, 37 Cal. App. 4th 1798, (Sept. 1995). See Marriage v. Kenner 26 Cal. App. 4th 186, (June 1994).

4. This Highest Courts supervisory power is respectfully requested in order to settle a matter of public interest. With parents living longer, and their children taking the role of care-givers and making proper decisions for their parents in terms of the estate and person, this High Court must ensure that state and federal statutes are upheld, as well as long existing High Court

5. The foregoing are special and important reasons for the writ of certiorari to be granted.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FILED
Feb.11,2004
By "s/Court of
Appeal Sixth App.
Dist._____
DEPUTY

| | |
|---|---|
| Conservatorship of the Person and Estate of THELMA LOUISE FRAZIER. | H026237 (Santa Clara County Super. Ct. No. 1-02-PR152094 |
| PHILLIP H. FRAZIER, Petitioner and Appellant, v. CARL E. FRAZIER et al., Objectors and Respondents. | |

Petitioner Phillip H. Frazier (Phillip)[1], in propria persona in this court as well as in the trial court, son of conservatee

[1]Convenience, not disrespect, is intended

Thelma Louise Frazier (Mrs. Frazier), appeals an order of the court approving and ratifying a settlement reached by his brother, objector Carl E. Frazier (Carl), their mother's conservator, in a dispute with Mrs. Frazier's next door neighbor over a foot-and-a-half wide strip of property next to her driveway. Phillip also appeals a subsequent order of he curt denying is motion for reconsideration.

FACTS

Mrs. Frazier and her neighbors, the Giuseppe Traino family, lived side by side at 663 and 661 North 15th Street, respectively, in San Jose. The land in dispute was a one-and-a-half foot strip next to Mrs. Frazier's driveway but on the Traino property.

by use of the parties first names. (in re Marriage of Cheriton (2001) 92 Cal.App.4th 269, 280.)

Mrs. Frazier had planted rose bushes and other vegetation on the strip, but in June 2000, she removed the plants and installed a concrete driveway extension with a permit from the City of San Jose. Traino filed a lawsuit to quiet title. (Traino v. Frazier No. CV793415.)

In the meantime, Mrs. Frazier in her 80s, suffered a series of strokes which diminished her mental and physical capacities. On January 14, 2003, CArl was appointed conservator. The next day a settlement conference in Traino v. Frazier was held and the matter settled. A written settlement agreement was executed on January 21, 2003. Carl then petitioned the probate court to confirm the settlement. On the hearing date, Phillip objected so the matter was set over for a week. At the next hearing, the court considered all the

filed papers and oral argument and granted the petition.

Phillip filed a motion for reconsideration. Carl filed an opposition and the matter was heard and denied on June 19, 2003. This appeal ensued.

## ISSUES ON APPEAL

On appeal Phillip contends that his mother "has satisfied every element of adverse possession" to the strip of land in dispute in Traino v. Frazier and that his motion for reconsideration should have been granted because his motion "sustained [sic] solid and substantial evidence and meet [sic] the requirements of Code of Civil Procedure § 1008."

## ADVERSE POSSESSION

Phillip asserts that his mother's possession of the strip of property satisfied every element of adverse possession, i.e., she made real property

tax payments on the strip, had actual possession of the property which was open and notorious, continuous and uninterrupted for five years, and which was hostile and adverse to the true owner's title, and was either under color of title or claim of right. (Code Civ. Proc., § 325.) Therefore, he concludes, judgment must be entered in her favor. Carl agrees that Phillip correctly stated the elements of adverse possession, but he declares there was a factual dispute as to whether there was sufficient (if any) evidence to show that the Fraziers paid real property taxes on the Traino property. Since this was an issue of fact settled by negotiations of the parties in consultation with their attorneys, the settlement should not be disturbed on appeal. He states there is a presumption that the

order of the lower court is correct.

It is Phillip's burden to show reversible error. (Walling v. Kimball (1941) 17 Cal.2d 364, 373.) This he has not done. There is nothing in the record that Phillip points us to or that we found that establishes that the Fraziers paid the taxes on the strip of Traino property. Consequently, there is no basis for us to conclude that the trial court abused its discretion in confirming the settlement. There was no error.

MOTION FOR RECONSIDERATION

Second, Phillip argues that his motion for reconsideration should have been granted.Carl Responds that no appeal may be taken from denial of a motion for reconsideration.

The first question is whether the underlying order was appealable . Probate Code section 1301 sets forth the grounds

for appeal of concervatorship orders. Subdivision (f) makes appealable orders granting or denying a petition under Probate Code section 2500 et seq. Section 2501, subdivision (a)(2), requires court approval of a settlement which affects (1) title to real property or (2) an interest in real property or a lien or encumbrance on real property. Consequently the order confirming the settlement is appealable.

The next question is whether a motion for reconsideration of an appealable order is itself appealable. "Superior court orders and judgments which are appealable are listed in Code of Civil Procedure section 904.1. However, [o]rders on reconsideration motions are not specifically listed and the only category in which they might be included is "an order made after judgment." (Code Civ. Proc. § 904.1 subd. (b).) (blue Mountain Development Co. v

Carville [(1982)] 132 Cal.App.3d [1005], 1010.) In Blue Mountain, we held that "the order denying reconsideration may be treated as an order made after judgment" and thus an appealable order, if the original ruling is an appealable order and if the motion for reconsideration is based on new and different facts. [Citation.] However, if the motion for reconsideration is "based on exactly the same [factual] showing offered in support of the original application," the order denying reconsideration is not appealable. [Citations.] We have now determined that the better ruling in that a denial of a motion for reconsideration is a nonappealable order." (Rojes v. Riverside General Hospital (1988) 203 Cal.App.3d 1151,1160.)

Phillip may not appeal denial of the motion for reconsideration. This portion of the appeal is dismissed as taken from.

a nonappealable order.

DISPOSTION

The judgment is affirmed.

"s/ Premo, J.
Premo, J.

WE CONCUR:

"s/ Rushing, P.J.
Rushing, P.J.

"s/ Elia, J.
Elia, J.

Conservatorship of Thelma Louise Frazier

H026237

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SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

In re the matter of:
THELMA LOUISE FRAZIER,
Conservatte.
_____/

Case no.
1-02-PR 152094

ORDER AFTER HEARING

Date: June19,2003
Time: 9:00 a.m.
Dept: 13
Judge: Hon. Thomas C. Edwards

1. The Court found that there is no merit and no new facts and the Motion for Reconsideration under CCP § 1008 et seq. and therefore hereby denies Phillip Frazier's Motion for Reconsideration.

APPENDIX B

IT IS SO ORDERED.

DATED: June 25, 2003

"s/C.A. GALLAGHER
HONORABLE
C.A. Gallagher
JUDGE OF THE
SUPERIOR COURT

Court of Appeal
Sixth Appellate District
No. H026237 -

S123467

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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Conservatorship of the Person
and Estate of THELMA LOUISE FRAZIER

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PHILLIP H. FRAZIER, Petitioner and Appellant,

v.

CARL E. FRAZIER et al., Objectors and Respondents.

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Petition for review DENIED.

Werdegar, J., was absent and did not participate.

SUPREME COURT FILED

April 28, 2004

"s/Fredercik K. Ohlrich

Clerk

Deputy

APPENDIX C

"s/GEORGE

Chief Justice

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Phillip H. Frazier

PHILLIP H. FRAZIER, IN PRO SE

Dated: February 02 2005